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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

C.M., on her own behalf and on behalf of her minor child, B.M.; L.G., on her own behalf and on behalf of her minor child, B.G.; M.R., on her own behalf and on behalf of her minor child, J.R.; O.A., on her own behalf and on behalf of her minor child, L.A.; and V.C., on her own behalf and on behalf of her minor child, G.A..

No. 2:19-CV-05217-SRB

**UNITED STATES' RESPONSE TO
THE COURT'S ORDER DATED
FEBRUARY 15, 2022 (ECF 137)**

Plaintiffs,

V.

United States of America,

Defendant.

1 On February 15, 2022, the Court issued an order granting in part and denying in part
 2 Plaintiffs' motion to compel discovery withheld by the Government based on privilege.
 3 *CM ECF 137; APF ECF 136.*

4 In Part I of the order, the Court listed the documents it found were properly
 5 redacted to protect attorney-client and/or work product privilege. *CM ECF 137 at 2-4;*
 6 *APF ECF 136 at 2-4.*

7 In Part II of the order, the Court listed the documents it found were redacted and
 8 not privileged. *CM ECF 137 at 4-5; APF ECF 136 at 4-5.* The United States has produced
 9 those documents to Plaintiffs un-redacted in accordance with the Court's order.

10 In Part III of the order, the Court addressed an email thread relating to an editorial
 11 in USA Today dated May 30, 2018. The Court ordered the United States to re-review the
 12 USA Today editorial-related email strings, and produce a final version that has no
 13 redactions for emails inconsistently previously redacted and to leave redacted only those
 14 portions of emails that are clearly legal analysis and not advice about how best to respond
 15 to the editorial or to the public relations issues the editorial created. *CM ECF 137 at 6;*
 16 *APF ECF 136 at 6.* The United States has produced these documents to Plaintiffs with
 17 revised (and, for some emails in the thread, completely removed) redactions, in
 18 accordance with this Court's order.

19 Also in Part III of the order, the Court ordered the United States to respond to four
 20 questions from the Court relating to a document titled, "DHS Response to DOJ Analysis
 21 of Litigation Risk Associated with Draft MOA between ORR and DHS." *CM ECF 137 at*
 22 *5-6; APF ECF 136 at 5-6.* The United States provides the following responses:

23 First, the MOA referenced in this document was finalized by the Department of
 24 Homeland Security (DHS) and the Department of Health and Human Services (HHS), and
 25 was produced to Plaintiffs. A copy will be provided to the Court for further context, to
 26 assist the Court in its analysis of whether the "DHS Response to DOJ Analysis of
 27 Litigation Risk Associated with Draft MOA between ORR and DHS" (hereinafter "DHS
 28 Response") is privileged. As for the "DHS Response" itself, to the best of the
 government's knowledge following a search of the documents, all copies of this document

1 produced to Plaintiffs had the “Draft” imprint and the header stating “ATTORNEY
 2 WORK PRODUCT/ATTORNEY-CLIENT PRIVILEGED COMMUNICATION/PRE-
 3 DECISIONAL DRAFT”. No version without these markings has been located.

4 Second, both the attorney-client privilege and work product doctrine are claimed
 5 for the DHS Response. The DOJ’s risk analysis referenced therein (and further discussed
 6 below) was addressed to DHS and HHS, and the DHS Response appears to have been sent
 7 to DOJ for further discussion. A copy of the parent email, which was not redacted for
 8 privilege and was not included with the DHS Response when submitted to the Court for *in*
 9 *camera* review, will be provided to the Court for further context to assist in the Court’s
 10 analysis.

11 Third, the DOJ’s risk analysis has not been produced. However, it has been located
 12 and will be produced forthwith to Plaintiffs, subject to any applicable redactions for
 13 privilege. If the Court wishes to review this document *in camera* to assist in its analysis,
 14 the United States will promptly submit a copy to the Court.

15 Fourth, the claim for the work product doctrine is on behalf of both DOJ and DHS.
 16 Because the document was created by DHS attorneys and contains those attorneys’ legal
 17 analysis of potential litigation risk associated with entering into a memorandum of
 18 agreement with HHS’s Office of Refugee Resettlement (“ORR”), the document contains
 19 DHS’s work product. Additionally, the document also contains DOJ’s work product
 20 because it both references and directly quotes from DOJ’s “Analysis of Litigation Risk
 21 Associated with the Draft Memorandum of Agreement Between the Office of Refugee
 22 Resettlement and the Department of Homeland Security,” which was created by DOJ
 23 attorneys to assess potential litigation risk associated with the proposed memorandum of
 24 agreement.

25 Submitted this 25th day of February, 2022.

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 28 Civil Division
 JAMES G. TOUHEY, JR.

1 Director, Torts Branch

2 *s/ Phil MacWilliams*

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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on February 25, 2022, I electronically transmitted the attached
18 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
19 Notice of Electronic Filing to all CM/ECF registrants.

20 *s/ Phil MacWilliams*

21 PHILIP D. MACWILLIAMS

22 Attorney for United States of America